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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER

vs.

JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

LEONARD WEINBERG,
ALLAN ELI COHAN,
J. PAUL SCHMIDT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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Petitioner,

vs.

JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

PETITION FOR REHEARING

To the Honorable the Supreme Court of the United States:

Your petitioner, David Fisher, respectfully prays that a rehearing be granted him pursuant to Rule 33 of the Rules of this Court, in the above cause, and that the Order of this Court denying the Writ of Certiorari be reconsidered.

Statement

By order of this Court dated May 21, 1945, the petition for Writ of Certiorari was denied on the ground that the petition was not filed within the time limited by Section 8 (a) of the Judiciary Act of February 13, 1925, which requires applications for all writs of error, appeal or writ of certiorari intended to bring any judgment or decree before the

Supreme Court for review shall be made within three months after the entry of the judgment or decree intended to be reviewed.

The record in the present case reveals the following docket entries in the Court of Appeals of Maryland, the decision of which Court was intended to be reviewed:

Appeal from the Baltimore City Court. Filed August 22 1944.

December 20, 1944, Judgment affirmed with costs to appellee. Opinion filed. Op. Capper, Jr.

January 20, 1945. Mandate sent.

This Court in denying the Writ on the ground that the petition therefor was not filed within the time required by the statute, assumed the date of the entry of the judgment to be December 20, 1944.

The Rules of the Court of Appeals of Maryland on the subject of entry of the judgment are as follows:

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"Code, Article 5, Sec. 24

"Section 1. In all cases where judgments shall be reversed or affirmed by the Court of Appeals, and it shall appear to the Court that a new trial ought to be had, such new trial shall be awarded, and a certified copy of the opinion and judgment of the Court of Appeals shall be transmitted forthwith to the Court from which the appeal was taken, to the end that said cause may be again tried as if it had never been tried, and no writ of procedendo, with transcript of record, shall be transmitted, as heretofore practiced.

"Section 2. When an appeal is dismissed or a judgment or decree is affirmed or reversed without being remanded, the Clerk of this Court shall transmit a copy of the docket

entries, under the seal of the Court, to the Court from which the appeal is taken, or writ of error granted, as soon as practicable, not later than thirty days after the case is disposed of by this Court."

"REARGUMENT

"43

"Section 1. No motion for reargument will be entertained unless a petition, distinctly stating the grounds for the same, be filed within thirty days after the opinion of the Court has been delivered; and no reargument will then be allowed unless a majority of the Judges who concurred in the opinion consent to it. An opportunity will be given the opposite party to file a reply to such motion, if any member of the Court who concurred in the opinion requests it before the motion is acted on.

"Section 2. A motion for a reargument shall not prevent the issuance of a fieri facias, or other writ, or otherwise stay the proceedings, unless so ordered by the Court.

"Section 3. No writ shall issue, or other proceedings be taken (excepting remanding the cause) within thirty days from the time the opinion is delivered without leave of the Court."

The above sections of the Rules of the Court of Appeals of Maryland, as far as the petitioner's counsel have been able to determine, have never been the subject of construction, and are the only provisions in the Rules referring to the entry of the judgment or decree of the Court of Appeals of Maryland. It has always been the view of practitioners before the Maryland Bar, that the judgments and decrees of the Court of Appeals of Maryland were not entered until the expiration of thirty days after the filing of the opinion in the case.

The practice in the Court of Appeals of Maryland, which practice prevailed in the case of *Fisher* v. *Medwedeff, Trustee,* that the Court files with the Clerk a typewritten opinion of the Court, concluding with the notation, "Judgment affirmed with costs to appellee", without any formal order or judgment signed by the Court or any Judge thereof. Upon the filing of this opinion with the Clerk, the docket entry is made as appears in the record in this case, "Dec. 20, 1944, Judgment affirmed with costs to appellee. Opinion Filed, Op. Capper, Jr." No further action is taken by the Court or the Clerk until after the expiration of thirty days from the filing of the opinion. If no motion for reargument is filed within this period the Mandate issues, signed by the Clerk, on the thirty-first day. This issuance of the Mandate has always been considered the entry of the judgment or decree of the Court of Appeals of Maryland. In fact, there can be no action taken by the Court from which the appeal was presented until the Mandate from the Court of Appeals is actually received. Another instance indicating that the Mandate is the entry of the judgment of the Court of Appeals of Maryland is in a criminal case; the sentence is not executed until the Mandate is received by the lower Court, and in cases where the sentence of a death penalty is affirmed, the Governor cannot issue the death warrant until the Mandate is received in the lower Court.

These conclusions are further substantiated by the fact that Rule 43 refers to the filing of the "Opinion" as the date from which the thirty day period shall be counted. The filing of the "Opinion" is not referred to as the "judgment" or "decree" of the Court.

Likewise Rule 43 indicates that the filing of the "Opinion" is not the entry of the judgment or decree by enjoining the issue of any writ or other proceedings within the thirty days from the time the "Opinion" is delivered, without leave of the Court. It is only reasonable to conclude that

the statement "a motion for a reargument shall not prevent the issuance of a fieri facias, or other writ, or otherwise stay the proceedings, unless so ordered by the Court" refers only to staying such action after the expiration of the thirty days from the filing of the opinion, otherwise the two section of Rule 43 would be inconsistent.

The reference in Section 1 of Rule 8 that "a certified copy of the opinion and judgment of the Court of Appeals shall be transmitted forthwith to the Court from which the appeal was taken," in order to be consistent with Rule 43 must necessarily refer to the entry of the judgment by the issuance of the mandate, otherwise the two rules would be inconsistent and contrary one to the other.

The petitioner respectfully submits that the facts and circumstances above recited bring this case within the purview of the decision of this Court in the case of *Commissioner of Internal Revenue, petitioner,* vs. *Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor,* No. 710, October Term, 1944, where the facts were practically identical with the facts in the present case. In that case on August 8, 1944, the Circuit Court of Appeals for the Second Circuit filed a document entitled "Opinion"; on the same date the Clerk made a docket entry reading "Order reversed, A. N. Hand, C. J."; on August 29, 1944 a document entitled "Order for Mandate" was filed, and the Mandate issued that day; on November 29, 1944, the petition for writ of certiorari was filed. This Court reviewed the situation thoroughly and concluded that the first document filed on August 8, 1944 was only an opinion of the Court and was not the entry of the judgment. In reaching this conclusion this Court said:

> "* * * We are naturally impressed by the common understanding that in the Circuit Court of Appeals for the Second Circuit the so-called 'Order for Mandate' is deemed the judgment. Robertson and Kirkham,

Jurisdiction of the Supreme Court of the United States (1939) paragraph 384. We have taken and decided as a matter of course a considerable number of cases in which certiorari was sought within three months after entry of the 'Order for Mandate' but not within three months after the 'Opinion'. This practical understanding of the controlling significance, for appellate purposes, of the 'Order for Mandate' is supported and certainly not contradicted by all that is conveyed by the 'Opinion' and 'Order for Mandate' and the Rules of the lower Court.

"It does not detract from the 'Opinion' as an opinion that in its heading it gives as dated 'Argued January 6, 1944 Decided August 8, 1944' and that it concludes with 'The order of the Tax Court is reversed.' The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits judgment orders are separately filed. In spite of its title, the 'Order for Mandate' on its face fulfills the function of such a judgment order. It recites that

'It is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

'It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk,
By A. DANIEL FUSARO,
Deputy Clerk.'

"This language plainly imports that this is the judgment and that it is then being rendered. Nor does the fact that the order was prepared by the Clerk and bears his signature detract from its quality as a judgment. A judgment 'is the act of the court', Ex parte Morgan, 114 U. S. 174, 175, even though a Clerk does

all of the ministerial acts, as here, in conformity with his court's standing instructions.

"The Rules of the court below governing opinions, rehearing, issuance of mandate and stay of mandate are invoked to show that the 'opinion' is the appealable 'Judgment'. These Rules, like other rules, are not phrased with such fastidious precision as to make of all the parts a perfect harmony. But while substantial debating points may be taken, nothing in these Rules contradicts the natural meaning yielded by the terms of the 'Opinion' and the 'Order of Mandate', as reflected in the practice of the Second Circuit and in our own, which treats not the 'opinion' but the 'Order of Mandate', as the order of judgment. The Rules would have to be far less artistic than they are to warrant us in holding that the Circuit Court of Appeals has consistently misinterpreted some of its own rules. Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question of the bar practicing before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court.

"But now that the existing practice has revealed abstract disharmonies, if not difficulties, the Circuit Court of Appeals will doubtless establish a more tidy system for meeting the technical requirements for review here. The normal time for entering a judgment, as the starting point for determining whether review will be sought or whether there has been acquiescence in a judgment, should be fixed. The uncertainties inherent in litigation should not be needlessly prolonged. The entry of the 'Order for Mandate', which in the Second Circuit begins the running of the period for appeal, is apparently variable and vagrant. In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccess-

ful litigant to determine whether to seek further review. So long a period ought not to be extended by delay in entering a judgment nor should the burden of securing such entry be put upon the successful litigant. There are bound to be diversities in the modes of rendering and recording judgments of the forty-eight systems of State courts. Uniformity in the entry of judgment among the eleven circuits forming the single federal judicature ought to be capable of achievement without loss to the geographic flexibility of the system."

Approved in *Angelus Milling Co.* v. *Commissioner* No. 610, October Term, 1944.

It has been the common understanding in Maryland, that the issuance of the Mandate by the Clerk of the Court of Appeals of Maryland constituted the entry of the judgment or decree of that Court. Although the Mandate does not contain words in the exact phraseology of the "Order for Mandate", in the proceedings in the Circuit Court of Appeals for the Second Circuit the Mandate of the Court of Appeals of Maryland contains a repetition of the decision of the Court which the Clerk has then entered as the judgment or decree of the Court.

In the proceedings in the case of *Fisher* v. *Medwedeff*, no other order or judgment was entered than the Mandate signed by the Clerk and without this Mandate there would exist no signed order or judgment in the case.

There are cases in which the Court of Appeals of Maryland does sign a formal order. This occurs generally in Appeals from Court of Equity. This order is signed separate and apart from the opinion and is signed a few days in advance of the expiration of the thirty day period and is held by the Clerk until such expiration date. If no motion for reargument is filed, the Clerk files the order, issues the Mandate and attaches a copy of the order to the Mandate. This same procedure occurs also in appeals from

Court of Law where the decision is other than an affirmance or reversal of the judgment of the lower Court.

This practice, it is respectfully submitted, well establishes the commonly accepted rule that the issuance of the Mandate by the Clerk of the Court of Appeals of Maryland constitutes the entry of the judgment or decree of that Court.

Conclusion

It is respectfully submitted that the entry in the docket by the Clerk of the Court of Appeals of Maryland of the filing of the opinion of the Court in the case of *Fisher* v. *Medwedeff, Trustee,* accompanied by the notation of the decision of the Court, was not the entry of the judgment of the Court of Appeals of Maryland in this case, but that the entry of the judgment did not take place until January 20, 1945, when the Mandate was ordered and issued by the Clerk of the Court of Appeals of Maryland.

Respectfully submitted,

LEONARD WEINBERG,
ALLAN ELI COHAN,
J. PAUL SCHMIDT,
Attorneys for Petitioner.

The aforegoing petition has been read by me and I am able to certify that the Rules Nos. 8 and 43 of the Court of Appeals of Maryland, as quoted in the aforegoing petition and the procedure in entering opinions and judgments and decrees of the Court of Appeals of Maryland, are correctly stated therein.

J. C. MARTIN,
Chief Judge,
Court of Appeals of Maryland.

Certificate of Counsel

We, Allan Eli Cohan and J. Paul Schmidt, attorneys for the petitioner, do hereby certify that the within petition is presented in good faith and not for delay.

Dated at Baltimore, Maryland, June 13, 1945.

ALLAN ELI COHAN,
J. PAUL SCHMIDT,
Attorneys for Petitioner.

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